

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ROGER PALMER, *et al.*,

Plaintiffs,

v.

STEPHEN SISOLAK, *et al.*,

Defendants.

Case No. 3:21-cv-00268-MMD-CSD

ORDER

I. SUMMARY

On June 10, 2021, Plaintiffs¹ initiated this action challenging sections of Nevada Assembly Bill 286 (“A.B. 286”), which prohibits certain actions relating to firearms commonly referred to as “ghost guns,” as violating the Second Amendment and the Fifth Amendment’s Takings Clause. (ECF No. 1 (“Complaint”).) Shortly after initiating this action, Plaintiffs filed a motion for preliminary injunction to enjoin Defendants² from enforcing A.B. 286. (ECF No. 6.) The Court held a hearing on that motion (“the Hearing”) and ultimately declined to enjoin Defendants because Plaintiffs had failed to demonstrate a likelihood of success on the merits of their claims. (ECF Nos. 48, 51 (“Order”).)

Defendants now move to dismiss this action under Rule 12(b)(6) for failure to state a claim. (ECF No. 34 (“Motion”)³.) Because the Court agrees with Defendants for

¹Roger Palmer, Chad Moxley, and the Firearms Policy Coalition, Inc. (“FPC”) (collectively, “Plaintiffs”).

²Remaining Defendants are Nevada Governor Steven Sisolak; Attorney General Aaron Ford; Director of Public Safety George Togliatti; Division Administrator for Department of Public Safety’s Records, Communications and Compliance Division Mindy McKay (collectively, “Defendants”).

³Plaintiffs oppose dismissal and Defendants filed a reply. (ECF Nos. 53, 57.)

1 the reasons articulated in the Court's Order, and as further explained below, the Court
2 grants Defendants' Motion.

3 **II. BACKGROUND**

4 The following facts are adapted from the Complaint. (ECF No. 1.) Plaintiffs Roger
5 Palmer and Chad Moxley, both citizens of Nevada, own and possess multiple
6 unserialized firearms and previously self-manufactured unserialized component parts.⁴
7 (*Id.* at 5, 20-21, 24.) Moxley and Palmer are both members of the Firearms Policy
8 Coalition, Inc. ("FPC"). (*Id.* at 20, 23.) FPC's stated purpose is to defend and promote
9 Second Amendment rights to keep and bear arms. (*Id.* at 26.) Palmer owns and
10 possesses multiple uncompleted non-firearm objects and firearm building kits. (*Id.* at
11 21.) Moxley sells firearms and component firearm parts at local gun shows and seeks to
12 continue selling unserialized firearms, their component parts, and other non-firearm
13 objects. (*Id.* at 23-24.) Moxley made arrangements prior to the enactment of A.B. 286 to
14 attend six or more gun shows before the end of 2021. (*Id.* at 23.)

15 On June 7, 2021, Nevada's Governor Stephen Sisolak signed A.B. 286 into law.
16 (*Id.* at 2.) At a May 11, 2021, pre-enactment hearing, Assemblywoman Sandra
17 Jauregui—a sponsor of A.B. 286—made public statements about the law's purpose. (*Id.*
18 at 17, 20, 33, 35.) With its enactment, A.B. 286 amended Chapter 202 of the Nevada
19 Revised Statutes to prohibit "a person from engaging in certain acts relating to firearms
20 which are not imprinted with a serial number under certain circumstances[.]" A.B. 286,
21 2021 Leg., 81st Sess. (Nev. 2021).

22 This litigation centers on certain sections A.B. 286 added to Chapter 202, which
23 are as follows:

24 *Section 3* states in part that a person "shall not possess, purchase, transport or
25 receive an unfinished frame or receiver[.]" *Id.* at § 3(1).

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28 ⁴Plaintiffs use both "constituent" and "component" parts interchangeably in the
Complaint. For consistency purposes, the Court will use component parts throughout
this order.

1 Section 3.5 states in part that a person “shall not sell, offer to sell or transfer an
2 unfinished frame or receiver[.]” *Id.* at § 3.5(1).

3 Section 4 states in part that a person “shall not manufacture or cause to be
4 manufactured or assemble or cause to be assembled a firearm that is not imprinted with
5 a serial number” unless the firearm is: (a) rendered permanently inoperable, (b) an
6 antique firearm, or (c) determined to be a collector’s item. *Id.* at §§ 4(1); 4(1)(a)-(c).

7 Section 5 states in part that a person “shall not possess, sell, offer to sell,
8 transfer, purchase, transport or receive a firearm that is not imprinted with a serial
9 number” unless the person is a (a) law enforcement agency, (b) firearms importer or
10 manufacturer; or the firearm is: (a) rendered permanently inoperable, (b) manufactured
11 before 1969, (c) an antique firearm, or (d) determined to be a collector’s item. *Id.* at §§
12 5(1); 5(1)(a)-(b).

13 Section 5.5 further provides: “Nothing in the provisions of sections 3 to 5,
14 inclusive, of this act shall be deemed to prohibit the sale of an unfinished frame or
15 receiver or firearm that is not imprinted with a serial number to a firearms importer or
16 manufacturer or a license dealer before January 1, 2022.” *Id.* at § 5.5.

17 A person in violation of any part of §§ 3-5 is guilty of a gross misdemeanor for a
18 first offense and a category D felony for a second or any subsequent offense. *Id.* at §§
19 3-5. Sections 3 and 5 become effective on January 1, 2022. *Id.* § 10(2).

20 **III. LEGAL STANDARD**

21 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
22 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
23 provide “a short and plain statement of the claim showing that the pleader is entitled to
24 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
25 While Rule 8 does not require detailed factual allegations, it demands more than “labels
26 and conclusions” or a “formulaic recitation of the elements of a cause of action.”
27 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). “Factual
28 allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at

1 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
 2 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678
 3 (quoting *Twombly*, 550 U.S. at 570).

4 **IV. DISCUSSION**

5 Defendants argue that dismissal is warranted because A.B. 286 does not violate
 6 the Second Amendment, nor does the Fifth Amendment’s Takings Clause restrict the
 7 government’s power to regulate and prohibit “dangerous private property.” (ECF No.
 8 34.) The Court will first address the Second Amendment, followed by the Takings
 9 Clause of the Fifth Amendment. Because the Court finds that Plaintiffs have failed to
 10 state a claim upon which relief can be granted, the Court will grant Defendants’ Motion.

11 **A. Second Amendment**

12 The Second Amendment expressly states: “A well regulated Militia, being
 13 necessary to the security of a free State, the right of the people to keep and bear Arms,
 14 shall not be infringed.” U.S. Const. amend. II. In 2008, the Supreme Court held in
 15 *District of Columbia v. Heller* that the Second Amendment protects the “individual right
 16 to keep and bear arms.” 554 U.S. 570, 622. The “central component” of that right to
 17 bear arms is for self-defense, particularly defense of the home. *Id.* at 599, 628-29.
 18 However, the Court also cautioned that, “[l]ike most rights, the right secured by the
 19 Second Amendment is not unlimited” and historically speaking “the right was not a right
 20 to keep and carry any weapon whatsoever in any manner whatsoever and for whatever
 21 purpose.” *Id.* at 626.⁵ The Court later held that the Second Amendment is also fully
 22 applicable to states and municipalities through the Fourteenth Amendment. See
 23 *McDonald v. City of Chi.*, 561 U.S. 742, 790-91 (2010).

24 The Ninth Circuit has adopted a two-step framework to evaluate Second
 25 Amendment claims after *Heller* and *McDonald*. See *Young v. Hawaii*, 992 F.3d 765,

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 27 ⁵In *Heller*, the Supreme Court indicated that determining the scope of the Second
 28 Amendment’s protection requires a historical and textual analysis of the Amendment,
 see *id.* at 576-605, but the Court declined to undertake an exhaustive historical analysis
 of the full scope of the Amendment, see *id.* 626-27.

1 783-84 (2021) (en banc).⁶ The two-step inquiry requires courts to ask (1) whether the
 2 challenged law burdens conduct protected by the Second Amendment and (2) if the law
 3 burdens protected Second Amendment conduct, then the second step requires
 4 determining the appropriate level of scrutiny and applying it to the challenged law. See
 5 *id.*, 992 F.3d at 783-84.

6 “The level of scrutiny depends upon (1) how close the law comes to the core of
 7 the Second Amendment right, and (2) the severity of the law’s burden on the right.”
 8 *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 963 (9th Cir. 2014) (internal quotes and
 9 citation omitted). Courts must look at the “historical understanding of the scope of the
 10 right.” *Young*, 992 F.3d at 783 (quoting *Heller*, 554 U.S. at 625). A law that imposes a
 11 severe restriction on a core right, which destroys the protection of the Second
 12 Amendment, is “unconstitutional under any level of scrutiny.” *Jackson*, 746 F.3d at 961
 13 (citing *Heller*, 554 U.S. at 629). “[I]f a challenged law does not implicate a core Second
 14 Amendment right, or does not place a substantial burden on the Second Amendment
 15 right, [courts] may apply intermediate scrutiny.” *Id.* “[A]ll forms of the [intermediate
 16 scrutiny] standard require (1) the government’s stated objective to be significant,
 17 substantial, or important; and (2) a reasonable fit between the challenged regulation and
 18 the asserted objective.” *Id.* at 965 (quoting *Chovan*, 735 F.3d at 1129).

19 **1. Burden on Protected Conduct**

20 Defendants argue that Plaintiffs cannot meet the required two-step inquiry for
 21 their claim. (ECF No. 34 at 7-10.) More specifically, Defendants argue that Plaintiffs
 22 cannot show A.B. 286 burdens constitutionally protected Second Amendment conduct,
 23 and thus the inquiry ends there. (*Id.* at 7-8.) Plaintiffs counter that they have asserted a
 24 “strong, ultimately meritorious” Second Amendment claim as A.B. 286 is a law that
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27 ⁶See also *Silvester v. Harris*, 843 F.3d 816, 820-21 (9th Cir. 2016); *Peruta v.*
 28 *Cnty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016); *Jackson v. City & Cnty. of S.F.*,
 746 F.3d 953, 960-61 (9th Cir. 2014); *United States v. Chovan*, 735 F.3d 1127, 1136
 (9th Cir. 2013).

1 targets firearms in common use for lawful purposes, and the law targets the right to self-
2 manufacture firearms. (ECF No. 53 at 5-9.) The Court agrees with Defendants.

3 The focus of the analysis as stated in *Heller* requires the Court to determine
4 whether A.B. 286 burdens the “central component” of the right to bear arms for self-
5 defense in the home. See 554 U.S. at 599, 628-29. As it stands, A.B. 286 regulates
6 firearms not imprinted with serial numbers—the law therefore “does not interfere with
7 the right to ‘defense of hearth and home’” because Plaintiffs’ ability to use any and all
8 serialized firearms to defend their homes remains unchanged. (ECF No. 34 at 8
9 (quoting *Heller*, 554 U.S. at 635).) *Cf. Jackson*, 746 F.3d at 968 (“A ban on the sale of
10 certain types of ammunition does not prevent the use of handguns or other weapons in
11 self-defense. The regulation . . . limits only the manner in which a person may exercise
12 Second Amendment rights by making it more difficult to purchase certain types of
13 ammunition.”). Notably, Plaintiffs admitted at the Hearing that a person could still
14 acquire a serialized firearm from a licensed seller for defense of self and home under
15 A.B. 286. (ECF No. 48.) Thus, A.B. 286 does not target firearms in common use for
16 lawful purposes.

17 Moreover, A.B. 286 does not target the right to self-manufacture firearms.
18 Rather, it prohibits self-manufacturing of *unserialized* firearms. A.B. 286 § 4(1) (“a
19 person shall not manufacture . . . a firearm that is not imprinted with a serial number”).
20 Under the statutory scheme, Plaintiffs are not entirely stripped of the opportunity to self-
21 manufacture and assemble firearms, they are only prohibited from doing so with
22 unserialized firearms. See § 4(1). A.B. 286 additionally provides that individuals can
23 self-manufacture and assemble unserialized firearms so long as the firearms fall within
24 an exception. See § 4(1)(a)-(c). Accordingly, the Court finds A.B. 286 does not severely
25 burden Second Amendment protected conduct, but merely regulates it. Intermediate
26 scrutiny rather than strict scrutiny is therefore appropriate for the Court’s analysis of

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1 A.B. 286.⁷ See *Young*, 992 F.3d at 784 (stating that intermediate scrutiny applies in
 2 cases where Second Amendment rights are “affected in some lesser way”); see also
 3 *Teter v. Connors*, 460 F. Supp. 3d 989, 1003 (D. Haw. 2020) (citation omitted,
 4 emphasis in original) (stating that “[m]ost post-*Heller* decisions have landed on some
 5 form of intermediate scrutiny” and the court is unaware of any Ninth Circuit cases
 6 applying strict scrutiny in the Second Amendment context).

7 **2. Stated Objective and Reasonable Fit**

8 Defendants argue that “the ability of law enforcement to conduct serial number
 9 tracing” is “a substantial or important interest” of the State of Nevada. (ECF No. 34 at 9-
 10 10 (quoting *Pena v. Lindley*, 898 F.3d 969, 982 (9th Cir. 2018)).) Additionally, A.B. 286
 11 is a “reasonable fit” to that important interest as it does not prevent individuals who are
 12 legally permitted to obtain a firearm from purchasing a serialized firearm or receiver for
 13 home defense. (*Id.*) Plaintiffs appear to counter that the State’s important interest must
 14 be “narrowly tailored” to achieve its interest. (ECF No. 53 at 11-12.) Moreover, Plaintiffs
 15 assert the State’s claimed interest is “disingenuous,” “pretextual,” and an “attempt to
 16 justify the law as being something other than what it is.” (*Id.* at 13.) The Court disagrees
 17 with both of Plaintiffs’ arguments and finds they have failed to plausibly plead A.B. 286
 18 is not a reasonable fit for an important government interest.

19 As a preliminary matter, the Court rejects Plaintiffs’ apparent application of the
 20 strict scrutiny, rather than intermediate scrutiny standard. At the Hearing, Plaintiffs
 21 argued A.B. 286 must be “narrowly tailored” to the government’s objective. (ECF No.
 22 48.) But Plaintiffs appeared then—as they do now—to apply strict scrutiny, which the
 23 Court has previously determined is improper. (See ECF No. 51 at 8, n.8.) The Court
 24 reiterates that while courts have used various terminology to describe the intermediate-
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26 ⁷Defendants also argue that A.B. 286 would still pass constitutional muster under
 27 strict scrutiny review. (ECF No. 34 at 9-10.) Plaintiffs on the other hand, citing to
 28 *Jackson*, 746 F.3d at 961, together with *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct.
 2373 (2021), argue the Court should apply “exacting scrutiny” as the appropriate
 standard. (ECF No. 53 at 11, 13.) The Court declines to address these arguments as it
 has determined that intermediate scrutiny is the appropriate level of scrutiny.

1 scrutiny standard, as mentioned above, the government must show “a *reasonable fit*
2 between the challenged regulation and asserted objective” under intermediate scrutiny.
3 *Jackson*, 746 F.3d at 965 (quotes omitted, emphasis added); *see Teter*, 460 F. Supp.
4 3d at 1003 (stating that most decisions post-*Heller* “have landed on some form of
5 intermediate scrutiny.”). Intermediate scrutiny is not a strict test, and the Ninth Circuit
6 has expressed that the standard “does not require the least restrictive means of
7 furthering a given end.” *Silvester*, 843 F.3d at 827 (quoting *Jackson*, 746 F.3d at 966);
8 *see also Altman v. Cnty. of Santa Clara*, 464 F. Supp. 3d 1106, 1129 (N.D. Cal. 2020)
9 (“The Ninth Circuit . . . does not require narrow tailoring for firearm regulations subject to
10 intermediate scrutiny.”). As such, and despite Plaintiffs repeated contention, A.B. 286
11 need not be narrowly tailored to the government’s important objective.

12 The Court now turns to whether Plaintiffs plausibly assert that A.B. 286 fails to
13 pass intermediate scrutiny. In analyzing the first prong of intermediate scrutiny review,
14 the Court must determine whether the government’s stated objective is significant,
15 substantial, or important. *See Jackson*, 746 F.3d at 965. Defendants cite to a
16 congressional report that concludes unserialized firearms are a present and increasing
17 threat to public safety because they present a “homeland security challenge” and they
18 “hamstring[] law enforcement’s ability to investigate crimes committed with untraceable
19 weapons.” (ECF No. 34 at 5 (quoting H.R. Rep. No. 116-88, pt. 1, at 2 (2019).)
20 Defendants further note that law enforcement agencies recovered nearly 24,000
21 privately made firearms, without serial numbers on the frame or receiver, from crime
22 scenes between 2016 and 2020. (*Id.* (citing Definition of “Frame or Receiver” and
23 Identification of Firearms, 86 Fed. Reg. 27720,27722 (May 21, 2021) (to be codified at
24 27 C.F.R. pts. 447, 478, 479)). The Court, in considering the government’s stated
25 objectives, will not impose “an unnecessarily rigid burden of proof . . . so long as
26 whatever evidence the [government] relies upon is reasonably believed to be relevant to

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1 the problem that the [government] addresses.” *Jackson*, 746 F.3d at 965 (quoting
2 *Renton v. Playtime Theatres*, 475 U.S. 41, 50-52 (1986)).⁸

3 Here, A.B. 286 prohibits “a person from engaging in certain acts relating to
4 firearms which are not imprinted with a serial number.” A.B. 286, 2021 Leg., 81st Sess.
5 (Nev. 2021). When the Nevada Legislature considered A.B. 286, Assemblywoman
6 Sandra Jauregui—a sponsor of the Bill—echoed Congress’ concerns when she stated
7 that unserialized firearms are a threat to public safety because they circumvent
8 background checks, and they are untraceable if used in a crime. (ECF No. 34 at 6
9 (citing *Prohibits Certain Acts Relating to Firearms: Hearing on A.B. 286 Before Senate*
10 *Comm. on Judiciary*, 81st Session (May 11, 2021) (statement of Sandra Jauregui,
11 Assemblywoman)). Moreover, Assemblywoman Jauregui “explained that ghost guns are
12 an especially acute threat to Nevada because one of the largest unfinished receiver kit
13 companies in the nation, Polymer80, Inc. is based [in Nevada].” (*Id.*)

14 Plaintiffs do not contest the government’s interest is important or substantial. Nor
15 can they. It is “self-evident” that preventing gun violence and maintaining public safety is
16 a long-acknowledge and undeniably important government interest. *Chovan*, 735 F.3d
17 at 1139; *see also Jackson*, 746 F.3d at 965; *United States v. Salerno*, 481 U.S. 739,
18 748 (1977) (“[T]he Government’s regulatory interest in community safety can, in
19 appropriate circumstances, outweigh an individual’s liberty interest.”). Additionally, the
20 government’s objective in preserving law enforcement’s ability to investigate crimes
21 committed with untraceable weapons is also a substantial and important government
22 interest. *See Pena v. Lindley*, 898 F.3d 969, 981-82 (9th Cir. 2018) (holding that a
23 California law requiring new models of semiautomatic pistols to be imprinted with
24 characters, including a serial number, passed constitutional muster under intermediate
25 scrutiny because “preserving the ability of law enforcement to conduct serial number

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27 ⁸Plaintiffs seek to raise doubt regarding the justification behind A.B. 286 (see
28 ECF No. 53 at 17-20), but the Court declines to address these issues as the Court
makes clear here that it does not need to impose an unnecessary burden of proof so
long as the government’s stated objective is reasonably believed to be relevant to the
problem. *See Jackson*, 746 F.3d at 965.

1 tracing—effectuated by limiting the availability of untraceable firearms—constitutes a
2 substantial or important interest.”). As such, the government’s objectives in enacting
3 A.B. 286 are undeniably substantial and important, thus satisfying the first prong of
4 intermediate scrutiny.

5 The second prong of intermediate scrutiny requires a determination that A.B.
6 286’s regulations be a “reasonable fit” with the government’s asserted objectives.
7 *Jackson*, 746 F.3d at 965. Defendants articulate that A.B. 286 “addresses the threat
8 posed by unserialized firearms and firearm components.” (ECF No. 34 at 6.) A plain text
9 reading of A.B. 286 affirms that it does so by prohibiting the possession and sale of
10 firearms and component parts that lack serial numbers. §§ 3(1), 3.5(1). It also prohibits
11 a person from manufacturing or assembling an unserialized firearm unless it falls within
12 a categorical exception, see A.B. 286 § 4(1)(a)-(c). Moreover, A.B. 286 prohibits the
13 possession of unserialized firearms unless an exception applies, see § 5(1)(a)-(b).

14 A.B. 286 focuses only on unserialized firearms that (1) are not within a
15 categorical exception, (2) bypass background checks by virtue of self-manufacturing
16 and assembly, and (3) are untraceable without a serial number. Plaintiffs do not directly
17 challenge that A.B. 286 is not a “reasonable fit” for the state’s substantial or important
18 interest in promoting public safety or conducting serial number tracing. Instead, Plaintiffs
19 contend the government’s objectives are “disingenuous.” (ECF No. 53 at 12-17.)
20 According to Plaintiffs, if the purpose of A.B. 286 is to require firearms be serialized,
21 then the State would have established a mechanism permitting individuals to pass a
22 background check and obtain a state-issued serial number like California and
23 Connecticut. (*Id.*) But Plaintiffs misstate the purpose of A.B. 286. While the law requires
24 firearms be serialized, see A.B. 286 §§ 4, 5, the purpose itself is not to serialize
25 firearms. Rather, as Defendants clearly state, the purpose is to maintain public safety
26 and to preserve the ability of law enforcement to investigate crimes committed with
27 untraceable weapons. Plaintiffs’ repeated assertion that Defendants are required to
28 create a mechanism to obtain serialization appears to be an effort to mask another

1 effort to argue A.B. 286 must be “narrowly tailored” to the government’s stated
 2 objective.⁹ However, as the Court has made clear, intermediate scrutiny rather than
 3 strict scrutiny is appropriate in analyzing A.B. 286. Moreover, merely because California
 4 and Connecticut have chosen a different avenue to regulate unserialized firearms does
 5 not require Nevada to follow identically in tow. Because Defendants are not required to
 6 narrowly tailor their regulation, Plaintiffs’ argument is inapposite. Plaintiffs have thus
 7 failed to plead that A.B. 286 is not a reasonable fit for the state’s important interest of
 8 ensuring public safety. As such, Plaintiffs have failed to state a Second Amendment
 9 claim upon which relief can be granted.

10 **B. Fifth Amendment’s Takings Clause**

11 Plaintiffs allege that the enactment of A.B. 286 resulted in a “taking” of their
 12 unserialized firearms and component parts. (ECF No. 1 at 33-36.) The Takings Clause
 13 of the Fifth Amendment provides: “[N]or shall private property be taken for public use,
 14 without just compensation.” U.S. Const. amend. V. The Clause is made applicable to
 15 states through the Fourteenth Amendment. See *Chi., B. & Q.R. Co. v. Chicago*, 166
 16 U.S. 226, 239 (1897). A physical taking of property occurs “[w]hen the government
 17 physically takes possession of an interest in the property for some public purpose.”
 18 *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002).
 19 When a government regulation of private property becomes so onerous and thus “goes
 20 too far[,] it will be recognized as a taking.” See *Pa. Coal Co. v. Mahon*, 260 U.S. 393,
 21 415-16 (1922).

22 Although it is somewhat unclear from the Complaint and Plaintiffs’ opposition to
 23 the Motion, Plaintiffs appear to argue that A.B. 286 resulted in a regulatory taking and a
 24 nuisance taking.¹⁰ Defendants argue that Plaintiffs have failed to demonstrate a taking

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 26 ⁹To support this argument, Plaintiffs cite and discuss a state court action before
 27 the Third District Court of Nevada pertaining to A.B. 286. (ECF No. 53 at 13-17.) See
 28 *Polymer80, Inc. v. Sisolak*, Case No. 21-CV-00690 (Nev. 3rd. Jud. Dist. Ct. July 16,
 2021). The Court notes that the state court action has no binding authority on this Court.

¹⁰In its previous Order, the Court notably addressed the issue of physical taking
 because Plaintiffs’ motion for a preliminary injunction argued that the government had a

1 has occurred. The Court will first address the parties' arguments as they related to
 2 regulatory taking, then discuss the government's police power, and finally conclude by
 3 addressing Defendants' nuisance taking argument.

4 **1. Regulatory Taking**

5 Defendants argue that A.B. 286 is not a "physical appropriation" of property in
 6 violation of the Fifth Amendment's Takings Clause because the State is not taking title
 7 to unserialized firearms or component parts. (ECF No. 34 at 11.) Nor does the law
 8 violate the Takings Clause since the government is not required to compensate an
 9 owner when it prohibits a type of personal property through a "valid law." (*Id.* at 10-11.)
 10 Plaintiffs counter that unserialized firearms and component parts are subject to
 11 dispossession because A.B. 286 destroys or diminishes their value. (ECF No. 53 at 23.)
 12 A.B. 286 is thus a *per se* taking because it deprives all economically beneficial use of
 13 the property. (*Id.* at 23-14.) The Court disagrees with Plaintiffs.

14 The Supreme Court has articulated two guidelines for determining whether a
 15 government regulation is "onerous." See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942-43
 16 (2017). The first pertains to whether a regulation "denies all economically beneficial or
 17 productive use of" the property. *Id.* The second applies when a regulation does not so
 18 deny. In that case, "a taking still may be found based on a *complex of factors*, including
 19 (1) the economic impact of the regulation on the claimant; (2) the extent to which the
 20 regulation has interfered with distinct investment-backed expectations; and (3) the
 21 character of the governmental action." *Id.* (emphasis added and quotation marks
 22 omitted) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)
 23 ("*Penn Central*").

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 26 duty to provide "just compensation" since A.B. 286 required the property at issue be
 27 sold or transferred. (ECF No. 51 at 14-15.) In their response to the motion to dismiss,
 28 Plaintiffs do not oppose Defendants' argument that they are not taking title to the
 property at issue, nor does Plaintiffs raise concern that the alleged taking is not for a
 public purpose. (See ECF No. 53 at 20-24.) Because Plaintiffs' arguments pertain to the
 diminished value and economic benefit of unserialized firearms and component parts,
 the Court finds only a regulatory takings analysis is warranted.

1 Plaintiffs do not explicitly argue in their response that the *Penn Central* complex
2 factors test has been met for there to be a regulatory taking. (See ECF No. 53 at 20-24.)
3 Plaintiffs nevertheless conclude that the economic impact on the property at issue is
4 “substantial” and the character of the government’s action is an “invasion of property
5 interests” that requires compensation in accordance with the Takings Clause. (*Id.* at 24.)
6 But as the Court found in its previous Order, A.B. 286 does not deny all economically
7 beneficial or productive use of unserialized firearms and component parts, nor is it clear
8 based on the Complaint and the record the extent or certainty of the economic impact
9 on Plaintiffs. (ECF No. 51 at 11-12.) Without more, and because Plaintiffs fail to argue
10 the *Penn Central* complex factors test weigh in their favor, the Court declines to engage
11 further analysis. The Court therefore finds that Plaintiffs have not sufficiently pled a
12 regulatory taking claim.

13 **2. Police Power**

14 Even if the Court were to find there is a taking, regulatory or physical, Plaintiffs’
15 claim fails because A.B. 286 is an appropriate exercise of the government’s police
16 power. In their Motion, Defendants argue the government does not need to compensate
17 Plaintiffs when A.B. 286 prohibits “a type of personal property” via a “valid law.” (ECF
18 No. 34 at 10.) That is because, according to Defendants, the Takings Clause does not
19 restrict the government’s traditional power to regulate and prohibit “dangerous private
20 property.” (*Id.* at 2.) Although not explicit, inherent in Defendants’ argument is that A.B.
21 286 is an appropriate exercise of the government’s police power. Plaintiffs appears to
22 counter that Defendants have not demonstrated unserialized firearms and component
23 parts are either “dangerous,” “unusual,” or “both.” (ECF No. 53 at 21.) The Court agrees
24 with Defendants.

25 The police power exception to the Takings Clause provides that “[a] prohibition
26 simply upon the use of property for purposes that are declared, by valid legislation, to
27 be injurious to the health, morals, or safety of the community, cannot, in any just sense,
28 be deemed a taking.” *Mugler v. Kansas*, 123 U.S. 623, 668 (1887). “If [an] ordinance is

1 otherwise a valid exercise of the [government's] police powers, the fact that it deprives
2 the property of its most beneficial uses does not render it unconstitutional.” *Goldblatt v.*
3 *Hempstead*, 369 U.S. 590, 592 (1962) (collecting cases).

4 The Court is unaware of—and the parties have not pointed to—any binding Ninth
5 Circuit case explicitly discussing police power exception to the Takings Clause in the
6 context of firearms regulations.¹¹ However, several other courts have applied this
7 principle in finding that firearm regulations do not constitute a taking. *See Adkins v.*
8 *United States*, 82 Fed. Cl. 619, 623-24 (2008) (holding that prohibition on the sale of
9 machine guns to anyone other than law enforcement agencies did not constitute a
10 physical or regulatory taking); *Fesjian v. Jefferson*, 399 A.2d 861 (D.C. 1979) (holding
11 that a statute requiring machine guns denied registration be sold, surrendered, or
12 disposed, was a valid exercise of police power thereby not a taking); *Rupp v. Becerra*,
13 Case No. 8:17-cv-00746-JLS-JDE, 2018 WL 2138451, *8-*9 (C.D. Cal. May 9, 2018)
14 (dismissing a Takings claim on the grounds that a California prohibition on certain
15 weapons represented an exercise of police power and not a taking). The Court finds this
16 authority persuasive and concludes that firearm regulations may fall within the police
17 power exception.

18 While Plaintiffs contend Defendants have not demonstrated that the property at
19 issue are “dangerous” or “unusual,” Defendants—and the Nevada Legislature—have in
20 fact adequately demonstrated that unserialized firearms and component parts are
21 properly considered “dangerous private property.” As discussed above, public safety
22 and the importance of firearm tracing necessitates the prohibition of unserialized
23 firearms and component parts. It is not clear what further showing Plaintiffs demand.
24 Nevertheless, the Court finds that Defendants have properly invoke the police power
25 exception, thus A.B. 286 is not a taking.

26 ¹¹The Court notes in an unpublished opinion, *Duncan v. Becerra*, 742 F. App'x
27 218 (9th Cir. 2018), the Ninth Circuit was presented with a similar Takings Clause claim.
28 But there, the Ninth Circuit affirmed the district court's findings on a deferential abuse of
discretion standard. The Court finds the guidance from *Duncan* inconclusive as applied
to the facts of this case.

3. Nuisance Taking

In their opposition to the Motion, Plaintiffs also seek to characterize A.B. 286 as a “nuisance taking.” (ECF No. 53 at 21-22.) Citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992), Plaintiffs argue that A.B. 286 can only be proper if the property or its intended use has historically been prohibited. (*Id.* at 22.) Plaintiffs’ reliance on *Lucas*, however, is misplaced.

In *Lucas*, the Supreme Court stated that, “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” 505 U.S. at 1019. Therefore, “[w]here a regulation ‘denies all economically beneficial or productive use of land,’ the multi-factor analysis established in *Penn Central* is not applied, and a compensable taking has occurred unless ‘the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.’” *Esplanade Props., Ltd. Liab. Co. v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002) (quoting *Lucas*, 505 U.S. at 1027). But as the Court discussed above, A.B. 286 does not deny all economically beneficial or productive use of the property to be a *per se* taking. Even if the Court found differently, the *Lucas* decision articulated that compensation “must be accorded” to “regulations that prohibit all economically beneficial use of *land*[.]” 505 U.S. at 1029 (emphasis added). A.B. 286, however, does not regulate land nor real property. Plaintiffs’ nuisance taking argument is therefore legally infirm.

Defendants have thus shown that as a matter of law, A.B. 286 cannot constitute a regulatory taking. The Court will thus dismiss Plaintiff’s Fifth Amendment’s Takings Clause claim.

V. LEAVE TO AMEND

Plaintiffs request the Court grant them leave to amend their Complaint, but Plaintiffs do not explain how their Complaint can be cured by amendment. (ECF No. 53 at 2.) The Court has discretion to grant leave to amend and should freely do so “when

1 justice so requires.” *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)
2 (*quoting* Fed. R. Civ. P. 15(a)). Because Plaintiffs do not challenge that public safety is
3 a substantial or important government interest, nor do they argue that A.B. 286 is not a
4 reasonable fit to the government’s stated objective, the Court finds the deficiencies in
5 the allegations regarding their Second Amendment claim do not appear to be curable.
6 Moreover, the police power exception applies to the Fifth Amendment takings claim,
7 and thus leave to amend that claim would be futile. Accordingly, Plaintiffs’ request for
8 leave to amend their Complaint is denied.

9 **VI. CONCLUSION**

10 The Court notes that the parties made several arguments and cited to several
11 cases not discussed above. The Court has reviewed these arguments and cases and
12 determines that they do not warrant discussion as they do not affect the outcome of the
13 Motion and the issues before the Court.

14 It is therefore ordered that Defendants’ motion to dismiss the complaint (ECF No.
15 34) is granted.

16 The Clerk of Court is directed to enter judgment accordingly and close this case.

17 DATED THIS 29th Day of March 2022.

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22 MIRANDA M. DU
23 CHIEF UNITED STATES DISTRICT JUDGE
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